



Comptroller General
of the United States

Washington, D.C. 20548

147957
Ahearn

Decision

Matter of: Entwistle Company

File: B-248464.2

Date: November 2, 1992

Henry E. Steck, Esq., Thurman, Harrison & Steck, for the protester.

Rose Trafton, Esq. and Demetria Carter, Esq., Department of the Navy, for the agency.

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DIGEST

1. Protest that discussions were inadequate based on alleged surprise questions posed by the agency during site visit is untimely and will not be considered where not filed with General Accounting Office within 10 working days of conclusion of site visit.

2. Protest that evaluation and resulting rejection of proposal was improperly based on unstated evaluation criteria is denied where, contrary to protester's argument, deficiencies cited as basis of rejection were reasonably related to evaluation criteria.

DECISION

Entwistle Company protests the rejection of its offer as technically unacceptable under request for proposals (RFP) N68335-91-R-0090, issued by the Department of the Navy for the design and manufacture of T-10 aircraft hydraulic component test stands.

We deny the protest.

The RFP, as amended, requested offers on a firm-fixed price basis for test stands to be used for the testing of aircraft hydraulic components. Essentially, the equipment consists of a computer controlled hydraulic console, which are used to perform various tests on aircraft components. The solicitation included a purchase description that described, in terms of design and functional specifications, equipment characteristics considered essential to meet the government's minimum needs. It warned offerors that proposals "must clearly present sufficient information to

allow evaluation based on the requirements" and that the proposal "shall include any necessary drawings, components list, backup calculations, and data as necessary to support the proposed design."

The solicitation provided that proposals would be evaluated first for technical acceptability in eight described areas, including computer hardware and software; computer software is at issue here. Under the computer software area, offerors were instructed, among other things, to "describe the system software to be used for the test stand control" and "describe the software development system to be utilized." Once a proposal was determined acceptable, the quality assurance portion of the proposal (in terms of past performance and negative quality history) would be evaluated for acceptability. Award was to be made to the technically acceptable low offeror rated acceptable for quality assurance.

The agency received nine proposals by the initial closing date. Following technical evaluation, four proposals were rated technically acceptable; three, including Entwistle's, were rated unacceptable, but susceptible of being made acceptable; and two were rated technically unacceptable and excluded from the initial competitive range. Among the evaluated deficiencies in Entwistle's proposal were several in the software area. The evaluators determined that Entwistle failed to provide information required by the purchase description and a description of whether the software would perform certain required functions.

The agency opened discussions with the firms in the initial competitive range by providing discussion questions (in a letter dated February 24, 1992) approximately 1 month before planned site visits were to be conducted. Entwistle was provided with 18 questions. Among other things, the questions requested information on the evaluated software deficiencies.¹ Entwistle responded to these questions prior to the site visit, by letter dated March 19. The agency evaluated the responses and determined that they indicated a major change regarding the software proposed by Entwistle. According to the agency, Entwistle indicated in its March 19 submission that it planned to develop the software in-house, rather than buy the software, as the agency had read the firm's initial offer as proposing. After evaluation of the firm's March 19 submission, the agency determined Entwistle

¹Pursuant to the February 24 letter, offerors were requested "to prepare to discuss the questions" and "to provide brief written answers to the questions after we have discussed the questions and other issues which may be covered during the upcoming site visit."

still failed to provide sufficient information, primarily in the software area, to show that the firm could meet the solicitation requirements. In further discussions, the agency then submitted 84 additional questions to Entwistle (by facsimile transmission on March 30), 1 day before the commencement of the site visit. These questions concerned software, as well as other items. (Seventy-three of the questions were specific to Entwistle, the remaining 11 were furnished to all offerors.)

During the Entwistle site visit, held from March 31 to April 2, the firm made a presentation to agency technical evaluators, submitted written responses to the agency's March 30 questions, and also furnished responses to five additional questions raised during the site visit. Entwistle's responses to the March 30 questions consisted of either yes/no responses or no response; the firm's responses to the remaining five questions were in narrative form. Further discussions then were conducted with the firm. In the area of software, the agency evaluators considered Entwistle's discussions brief and the information provided insufficient to demonstrate technical acceptability. Entwistle's oral responses to follow-up questions posed by the agency to the firm's yes/no written responses indicated to the evaluators that the firm was unable to provide further explanation.²

After consideration of Entwistle's initial proposal, subsequent submissions, and the further discussions with the firm, the evaluators determined that the firm had not demonstrated that it could meet the requirements of the solicitation, particularly in the software area. Consequently, they concluded that Entwistle's proposal was technically unacceptable. Entwistle was notified of this determination at the conclusion of the site visit. The contracting officer subsequently agreed with this determination and notified the firm of the rejection of its offer in a detailed letter dated April 15. (Six proposals now remain in the competitive range.)

Entwistle raises two principal arguments: (1) the Navy failed to conduct adequate meaningful discussions, since

²Additionally, the agency's negotiators were concerned that Entwistle's proposed price appeared to be unrealistically low and pointed out areas of the firm's proposal which contained suspected pricing mistakes. The record indicates that Entwistle generally failed to respond to the specifics raised by the agency and instead responded that the low costing on some items was compensated by high costing on other items.

some of the discussion questions were raised by surprise during the site visit, and Entwistle therefore did not have an adequate opportunity to respond; and (2) the agency improperly rejected the firm's proposal as technically unacceptable based on the erroneous belief that the firm initially proposed to purchase off-the-shelf software, and only later offered to develop the software in-house; Entwistle contends that, contrary to the Navy's determination, it always intended to develop the software in-house and this was spelled out in sufficient detail in its initial proposal.

We will not consider Entwistle's first argument. Under our Bid Protest Regulations, to be timely a protest must be filed within 10 working days after the basis of protest is known or should have been known. 4 C.F.R. § 21.2(a)(2) (1992); Adrian Supply Co.--Recon., B-242819, 3, July 17, 1991, 91-2 CPD ¶ 64. Entwistle was aware of the agency's actions forming the basis of this protest ground--i.e., the alleged surprise site visit questions--at the conclusion of the site visit on April 2. If Entwistle objected to the use of allegedly previously undisclosed questions during this phase of negotiations, it was required to protest to that effect no later than 10 working days later, that is, by April 16; it could not delay the raising of this protest ground until after receipt of written notification of the rejection of its proposal.³ Because Entwistle did not file its protest until April 24, more than 10 days after April 2, it is untimely and will not be considered. See Johnson, Basin and Shaw, Inc., B-240265 et al., Nov. 7, 1990, 90-2 CPD ¶ 371 (fn. no. 5).⁴

³In any case, it does not appear that the questions were previously undisclosed as alleged; Entwistle has acknowledged that it received the majority of the complained of questions on March 30, one day before the commencement of the 3-day site visit. Moreover, even if the allegation were supported by the record, it is not apparent--and Entwistle has not explained--why the firm could not have submitted whatever more thorough responses it believed were necessary during the 4-day discussion period after the site visit.

⁴In its comments on the agency report, filed in our Office on June 24, Entwistle for the first time argues that the Navy improperly failed to notify the firm of its concern that there appeared to be a mistake in the firm's cost proposal. This argument also is untimely, since it was not filed within 10 working days after the agency's April 15 rejection letter, in which the agency's concern with the firm's cost proposal was detailed. 4 C.F.R. § 21.1(a)(2).

Entwistle's second argument concerning the agency's alleged miscalculation of the firm's proposed software is without merit. The evaluation of a proposal and the resulting competitive range determination are matters within the discretion of the contracting activity, which we will examine only to ensure that the determinations were reasonable and in accord with the evaluation criteria. Satellite Transmission Sys., Inc., 70 Comp. Gen. 624 (1991), 91-2 CPD ¶ 60.

Preliminarily, we note that the fact that the Navy may have misread Entwistle's initial software proposal is irrelevant. Regardless of the agency's reading of the firm's initial proposal, the record shows, and Entwistle does not dispute, that the agency ultimately evaluated Entwistle on the basis of its proposal to develop the software in-house, and eliminated the firm from the competitive range on the basis of this correct reading of the proposal. The focus of our review of Entwistle's second argument, therefore, is on whether the Navy reasonably concluded that Entwistle did not adequately demonstrate its software development capability.

Entwistle maintains that the information it provided was sufficient to satisfy the solicitation's requirement to "describe the software development system to be utilized." However, the protester fails to tie any of the information furnished to the specific deficiencies cited by the agency, and fails to indicate where in its proposal it addressed the specific deficiencies cited by the agency. A representative deficiency cited by the Navy concerning Entwistle's proposed software is that it "was ambiguous in terms of size and complexity of the code; [Entwistle] indicated that they based their software estimate on the number of functions/procedures within the overall program, however when asked they could not approximate how many and what type of functions/procedures would be required." Also in this area, the agency considered the firm's manhour estimation methods for developing software inadequate. According to the agency, they "appeared to be arbitrary; Entwistle did not consider defined project goals, the complexity of those goals, the number of those goals, the number of lines of code or the number of modules when estimating the manhours required to accomplish the requirements." Entwistle was put on notice of the agency's concerns in this area with the March 30 questions which included the following: (1) "what estimation techniques are used to estimate lines of code (LOC), software cost, and software schedule?"; (2) "what is the estimated LOC for this project?"; (3) "is there a formal procedure to make estimates of software size?"; and (4) "how many people will be involved in the software development?" There is no indication in the record that Entwistle provided answers to these questions, and the firm does not point to any specific


areas of its proposal or subsequent submissions which addressed the agency's concerns.

Additionally, the record indicates (in an affidavit) that, during discussions, one of the agency evaluators asked Entwistle's software engineer how the firm had derived its time and work estimates, and that Entwistle provided no response. When the agency inquired further as to whether the firm's time and work estimates were based on complexity, number of modules, or number of lines of code, the engineer responded only "no" and another Entwistle employee stated that the estimate was based on the amount of time allotted by the government's schedule and that two people would be assigned to the software estimate. According to the agency, this response indicated that Entwistle's proposal was based on arbitrary assignments of personnel to workload. Entwistle does not contest this assessment, and we think it was reasonable under the circumstances.

Entwistle contends that the cited areas of deficiency show that the evaluation improperly was based on unstated factors. It is well established, however, that an agency may properly take into account specific, albeit not expressly identified, matters that are reasonably related to or encompassed by the stated evaluation criteria. Flight Int'l Group, 69 Comp. Gen. 741 (1990), 90-2 CPD ¶ 257; C3, Inc., B-241983.2, Mar. 13, 1991, 91-1 CPD ¶ 279. Here, the information in question concerned such things as size and complexity of the software code, and lines of code, which clearly are basic elements of the software system. As such, we think they clearly were proper considerations under the computer software evaluation.

We conclude from our review of the entire record that the evaluation of Entwistle's proposal was reasonable. Based on the major informational deficiencies in Entwistle's proposal, furthermore, we believe the Navy properly determined that Entwistle did not have a reasonable chance of receiving the award, and thus properly excluded the firm from the competitive range. See Educational Computer Corp., B-227285.3, Sept. 18, 1987, 87-2 CPD ¶ 274.

The protest is dismissed in part and denied in part.


for James F. Hinchman
General Counsel